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No. 663

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IN THE

Supreme Court of the United States

October Term, 1965

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.,
Petitioner

-vs-

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION, Owner and Publisher of the Detroit News, KNIGHT NEWSPAPERS, INC., Owner and Publisher of The Detroit Free Press, and NATIONAL LABOR RELATIONS BOARD,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

PHILIP T. VAN ZILE II
Counsel for Respondents
DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION, KNIGHT NEWSPAPERS, INC.
1881 First National Building
Detroit, Michigan 48226

BUTZEL, EAMAN, LONG, GUST & KENNEDY
Of Counsel for Respondent, The Evening News Association
DICKINSON, WRIGHT, McKEAN & CUDLIP
Of Counsel for Respondent, Detroit Newspaper Publishers Association
KENNETH MURRAY
Of Counsel for Respondent, Knight Newspapers, Inc.

THE INLAND PRESS, DETROIT, MICHIGAN

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A memorandum has now been filed (but not served on us)[1] on the Board's behalf urging summary vacation and remand so that it may reconsider this three year old case

[1]This memorandum, supporting in a limited way the petition for certiorari, was filed early in November as we are informed. Rules 24 and 33, as we understand them, required service on the undersigned as respondents' counsel. Our appearance had theretofore been entered by the Clerk. Notwithstanding, no such service was, or has been, made and we learned of the memorandum by chance when we filed the brief in opposition. As a member of the bar of the Supreme Court, counsel objects strenuously to this practice which has required the preparation and filing of this separate reply.

in the light of *American Ship Building* v. *Labor Board,* 380 U.S. 300, and *United Mine Workers* v. *Pennington,* 381 U.S. 657. The sole reason advanced for this indefinite postponement of a final decision herein is that the Board's expertise is a necessary prerequisite to judicial review. To grant such as a request would be not only a gross miscarriage of justice[2] but a relegation to the dust bin of the lower Court's careful review of the entire record in the light of the very arguments now advanced by the Board.

This case is, and was, ripe for judicial review. Not only were the facts disclosed by the extensive record largely undisputed but also the Court's supervening decisions in *American Ship Building, Pennington,* and *Labor Board* v. *Brown,* 380 U.S. 278, were fully considered by the Court below. A similar motion for remand, based on *American Ship Building,* was made weeks before the lower Court's decision. *Pennington* and its relevancy were fully considered on a petition for rehearing (Pet. App. D 86). Hence, this was not a case where the Board or the lower Court lacked the benefit of this Court's reasoning. The only question which the petition could conceivably raise is whether that reasoning was correctly applied. We believe it was for the reasons stated in our brief in opposition.

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[2]The incidents which gave rise to the complaint in this case occurred four or more years ago. Many of the principal witnesses are now deceased, retired and otherwise unavailable. Further, as the Court below observed (Pet. App. A, 16-17):

> "The Board had all the evidence before it concerning the layoff of the employees of the News, including the background of the newspaper situation in Detroit, the past records of the News and the Free Press in dealing with unions, the findings of the trial examiner and the arguments of counsel on the question at issue. The view now taken by the Supreme Court was argued to the Board and it chose not to follow it but to bottom its decision on its conclusion that any lockout, other than for the exceptions above mentioned, was illegal."

The memorandum's truncated statement of facts ignores and misstates the Board's own findings. Thus, it is flatly stated, without record reference, that there was no impasse prior to the lockout in this case (Mem. 5, fn. 4)[3]. Neither the examiner nor the Board so found, nor will the record support such a finding (Br. 6-8)[4]. It is similarly stated that the News locked out its employees in support of the Free Press bargaining position. This is diametrically opposed to the Board's own findings, confirmed by the lower Court (Br. 11-12). The true posture of the case may not be gleaned from the abbreviated statement in the memorandum. The governing facts have been fully stated with record references in our brief in opposition and need not be repeated here (Br. 4-12).

The decision which the Court is asked to review does not involve disputed questions of fact "but of a judgment as to the proper balance to be struck between conflicting interests", *Brown,* 380 U.S. at 292. As the Court there made clear, this is a proper subject for judicial determination. The Court below made such a determination and carefully considered and applied the pronouncements of this Court including the intervening decisions now cited by the Board.

In short, no matter how subtly phrased, the Board still seeks the "untrammeled authority to catalogue which economic devices shall be freighted with indicia of unlawful intent", *Brown,* 380 U.S. at 292, and the "general authority to define national labor policy by balancing the competing

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[3]Mem. 5, Fn. 4 refers to the memorandum for the National Labor Relations Board, the page number thereof and the footnote appearing on that page.

[4]Br. 6-8 refers to respondents' brief in opposition and the page numbers thereof.

interests of labor and management", *American Ship Building*, 380 U.S. at 318, in every case which does not precisely match the factual content of those cases.

This conclusion is inescapable when one considers that in this case the temporary layoffs were resorted to by the News in support of its legitimate bargaining position, under threat of strike and only after Mr. Hoffa's ultimatum terminating the bargaining had created an impasse. The lockout's sole purpose, as in *American Ship Building*, was to bring pressure to bear upon the Teamsters to modify their demands made upon the News. 380 U.S. at 312. Beyond this there is nothing except a positive record of 20 years of continuous bargaining with the Teamsters for contracts, all of which contained union shop clauses. There is not the slightest evidence of the type of intent or motivation which *American Ship Building* deemed essential to a Section 8(a)(1) and (3) violation. Unless the principles and policy there stated are to be abandoned, no legitimate grounds for review based on that case appear.

Pennington is even more remote. The memorandum distorts language from a minority opinion (381 U.S. at 665, 666) to buttress its claim that two employers bargaining with the same union in separate units may not support one another (Mem. 5). This was not even remotely involved in that case (Br. 17). But, more importantly, as has been demonstrated fully in our brief in opposition, the News finally resorted to the lockout in this case not in support of the Free Press but in support of *its own* bargaining position (Br. 11-12).

Considering the memorandum as a whole, there are no more fitting remarks than those of the Seventh Circuit when confronted with a similar request for remand (*American*

Brake Shoe Co. v. *National Labor Relations Board*, 244 F. 2d 489, 494, 495):

> " . . . If, as is advocated, this case were remanded to the Board for a redetermination of the §8 (d) issue, this action would merely give the Board another bite at the proverbial cherry, and, if such conduct were condoned, piecemeal litigation would result. Consequently, the request for remand is denied. . . . "

For the reasons herein stated, as well as in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP T. VAN ZILE II
Counsel for Respondents
DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION, KNIGHT NEWSPAPERS, INC.
1881 First National Building
Detroit, Michigan 48226

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Of Counsel for Respondent, Detroit Newspaper Publishers Association
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Dated: November 15, 1965.

END